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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 469

WILLIAM H. MILEY,

Petitioner,

vs.

ROBERT A. LOVETT, SECRETARY OF DEFENSE OF THE UNITED STATES; FRANK C. PACE, JR., SECRETARY OF THE ARMY, AND JOSEPH LAWTON COLLINS, CHIEF OF STAFF, UNITED STATES ARMY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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WILLIAM H. MILEY,

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vs.

ROBERT A. LOVETT, SECRETARY OF DEFENSE OF THE UNITED STATES; FRANK C. PACE, JR., SECRETARY OF THE ARMY, AND JOSEPH LAWTON COLLINS, CHIEF OF STAFF, UNITED STATES ARMY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, William H. Miley, prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit, *prior to judgment therein,* to bring before this Court for review the judgment of the United States District Court for the Eastern District of Virginia, entered October 24, 1951, discharging a writ of *habeas corpus* and dismissing petitioner's petition therefor.

Opinions Below

The memorandum opinion of the District Court (R. 64), filed October 18, 1951, is unreported. There has been no

action by the Court of Appeals, this petition having been filed prior to judgment in that court pursuant to 28 U.S.C., (1948) Section 2101 (e).

Jurisdiction

The judgment of the District Court herein was entered on October 24, 1951 (R. 70). That court had jurisdiction of this *habeas corpus* proceeding brought to secure the release of an Army officer held on active duty [1] because at the time suit was filed petitioner was detained and all parties were physically present within said court's territorial jurisdiction.[2] The record on appeal herein was docketed in the Court of Appeals on November 9, 1951. The jurisdiction of this Honorable Court is invoked under 28 U.S.C., (1948) Sections 1254 (1) and 2101 (e).

Question Presented

Whether one commissioned an officer in the Officers' Reserve Corps of the Army of the United States during World War II hostilities for a specific period of five years under Section 37 of the National Defense Act may lawfully be detained on active duty in the armed forces after expiration of his stated term of appointment.

Statutes Involved

The pertinent statutory provisions are printed in Appendix A, *infra*, pp. 16-19.

Statement

At the time this suit was filed petitioner was detained on active duty by respondents in The Pentagon Building, Arlington, Virginia, as a purported captain in the Officers'

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[1] See *Billings* v. *Truesdell*, 321 U. S. 542, 88 L. ed. 917.
[2] *Ex parte Endo*, 323 U. S. 283, 89 L. ed. 243.

Reserve Corps of the Army of the United States; and he sought release by *habeas corpus* from said detention upon the ground that his appointment and commission had expired on July 31, 1951. On petitioner's application the District Court issued a writ of *habeas corpus*, and respondents voluntarily appeared and submitted to the jurisdiction of the court. The issues presented were solely of law, requiring the court to determine which of several acts of Congress (set forth in Appendix A, *infra*, pp. 16-19) controlled or affected petitioner's term of appointment. On final hearing the District Court discharged the writ and dismissed the petition, holding that petitioner's term of appointment had been extended beyond its stated expiration date by virtue of Section 127(a), Par. 7, of the National Defense Act (10 U.S.C. § 513).

Petitioner had served on active duty in the Army of the United States from September 1, 1943 to July 31, 1946, rising in rank from private to captain during that period. On July 31, 1946 he reverted to inactive status, active hostilities with Germany and Japan having terminated prior thereto. On the same day, July 31, 1946, he was offered and accepted an appointment as captain in the Officers' Reserve Corps of the Army of the United States. A letter of appointment was forthwith issued to him, and later a formal commission, the latter stating that it evidenced "an appointment * * * under the provisions of Section 37, National Defense Act as amended * * * to continue in force for a period of five years from the date above specified, and during the pleasure of the President of the United States for the time being."[3] Petitioner was ordered to active duty on January 2, 1951, and is still being detained by respondents on active

[3] It is conceded by the Government that the "pleasure of the President" clause can be invoked only to curtail and never to extend terms of appointment.

duty, despite the fact that his stated term of appointment expired on July 31, 1951.

It is conceded by all parties that appointments made in the Officers' Reserve Corps "in time of war" continue in effect until six months after the termination of war—but the parties differ squarely as to the controlling statutory criteria, and hence as to the date of the termination of the war with respect to Reserve Corps appointments. Respondents assert the governing statute to be Section 127(a), Paragraph 7 of the National Defense Act (10 U.S.C. § 513), and attempt to justify their continued detention of petitioner on the ground that the war with Japan has not yet terminated within the meaning of that provision. Petitioner contends, to the contrary, that the said Section 127(a) has no application whatever to wartime appointments in the Officers' Reserve Corps; that such appointments were extended for the duration of the war plus six months solely by virtue of a Congressional enactment of December 13, 1941 (55 Stat. 799, 50 U.S.C., Appx. 731-732); and that Congress, by joint resolution of July 25, 1947 (S. J. Res. 123, 61 Stat. 449) declared *that* date (July 25) should be deemed to be the date of termination of the war with respect to said act of December 13, 1941.

Petitioner further contends that even should the said Section 127(a) be construed to apply in terms to wartime Reserve Corps appointments, and to extend said appointments for the duration of war plus six months, the aforesaid Joint Resolution of July 25, 1947, which declared the war to be terminated with respect to the act of December 13, 1941, necessarily terminated the war with respect to extension of appointments by section 127(a).

The determination of the controlling statute or statutes, therefore, constitutes the sole issue on the merits. If it is determined, either that the act of December 13, 1941 was the

sole authority for the extension of wartime Reserve Corps appointments, or, that the Joint Resolution of July 25, 1947 necessarily terminated the war with respect to Section 127(a) as well as the act of December 13, 1941, then there is no legislation now in force which could by possibility extend petitioner's appointment beyond its stated five-year term.

Reasons for Granting the Writ

1. The question presented herein is one of far-reaching public importance, for it necessarily concerns many thousands of reserve officers. These officers are now being held on active duty in the armed forces after expiration of their stated terms of appointment under circumstances which are similar in fact and identical in law with those of the instant case. The question involved is also one of great immediacy, for the lives of these many officers will be shaped—and, it may be, cut short—by the final decision of the question, and by the expedition or lack of it with which that decision is reached. It is submitted that the public importance of this question, and its compelling urgency, call for its prompt settlement by this Court.

See Rule 39 of this Court's rules and compare *United States* v. *United Mine Workers*, 330 U. S. 258, 269, 91 L. ed. 884; *Ex parte Quirin*, 317 U. S. 1, 87 L. ed. 3; *Carter* v. *Carter Coal Company*, 298 U. S. 238, 80 L. ed. 1160..

2. Unless certiorari be granted by this Court prior to hearing and judgment in the Court of Appeals, this case will in all probability become moot before the Supreme Court can pass upon it, since petitioner is now scheduled for release from active duty on June 2, 1952. Such an eventuality would not only preclude petitioner from a hearing in this Court, but would prevent this Court from

passing upon a question which, as set forth in paragraph 1, *supra*, vitally affects the destinies of thousands of officers similarly situated.

See Selective Service Act of 1948, as amended, 50 U.S.C. App. 451.

3. In no case can petitioner obtain effective relief from the Court of Appeals. For even should that court order his release from custody, the mandate issued to implement that order would doubtless be stayed pending application by the Government to this Court for writ of certiorari. In such event the passage of time through normal appellate procedure would cause this case to become moot before this Court could act to affirm or reverse the relief granted by the Court of Appeals, as the case might be.

See *Cheong Ah Moy* v. *United States*, 113 U. S. 216, 28 L. ed. 983; *Uyeki* v. *Styer*, 329 U. S. 689, 91 L. ed. 604.

4. It is submitted that the District Court's decision on the merits is clearly wrong, in that it repudiates the contemporaneous legislative and administrative interpretation of the statutes in question made throughout the period of hostilities by the Congress, the Attorney General, the Judge Advocate General of the Army and others, and, indeed, nullifies express terms of the Joint Resolution of Congress of July 25, 1947, the meaning and application of which are critical issues in the case at bar. An elaboration of this reason for granting the writ is set forth in the Argument, *infra*.

Argument

I. EXPRESSLY PURSUANT TO SECTION 37 OF THE NATIONAL DEFENSE ACT, PETITIONER WAS APPOINTED TO THE OFFICERS' RESERVE CORPS IN 1946 FOR A STATED TERM OF FIVE YEARS.

The National Defense Act contains one section and one section alone dealing with appointments in the Officers' Reserve Corps. It is Section 37 (10 U.S.C. §§ 351 *et seq.*), under which petitioner was expressly and specifically commissioned. This section provides in pertinent part:

> All persons appointed in the Officers' Reserve Corps are Reserve Officers and shall be commissioned in the Army of the United States. Such appointments in grade below that of Brigadier General shall be made by the President alone, and general officers by and with the advice and consent of the Senate. *Appointments in every case in the Officers' Reserve Corps shall be for a period of five years,* but an appointment in force at the outbreak of war shall continue in force until six months after its termination • • •. [Emphasis added.]

That petitioner's appointment was expressly for a five year term under the above provision is confirmed by the language of his letter of appointment (R. 15), the terms of his commission (R. 16A), and the contemporaneous regulations of the War Department (see Circ. 61, March 2, 1946, R. 39).

As for the proviso in the above statute that "an appointment in force at the outbreak of war shall continue in force until six months after its termination," this Court may take judicial notice of the fact that there has been no outbreak of war between the United States and any other power since July 31, 1946, the effective date of petitioner's commission. His appointment, therefore, was for a period

of five years, no more, no less; and it expired by its own terms on July 31, 1951.

II. SECTION 127(a) OF THE NATIONAL DEFENSE ACT HAS HAD NO APPLICATION TO APPOINTMENTS IN THE OFFICERS' RESERVE CORPS SINCE 1933.

Respondents contend that the specific provisions of Section 37 of the National Defense Act, quoted above, are modified by the general provisions of Section 127(a), Par. 7 of said Act (10 U.S.C. § 513), which reads as follows:

> "In time of war or national emergency determined by the President, any officer of the Regular Army may be appointed to higher temporary grade without vacating his permanent appointment. In time of war any officer of the Regular Army appointed to higher temporary grade, and all other persons appointed, as officers, shall be appointed and commissioned in the Army of the United States. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: *Provided,* That an appointment, other that that of a member of the Regular Army made in time of war, shall continue until six months after its termination, and an officer appointed in time of war shall be entitled to be relieved from active Federal service within six months after its termination if he makes application therefor."

Respondents assert that petitioner, despite his appointment under the said Section 37, is not entitled to be discharged from the Army until six months after the termination of World War II within the meaning of the said Section 127(a). Respondents are in error.

In the first place, Section 37 of the National Defense Act is a specific provision governing appointments in the Officers' Reserve Corps and, as such, under received principles of statutory construction, takes precedence over the

general provisions of Section 127(a). *United States* v. *Chase*, 135 U. S. 255, 34 L. ed. 117; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 76 L. ed. 704.

Furthermore, a study of the history of amendments to the National Defense Act shows that the Congress expressly intended Section 127(a), Par. 7, to have no bearing at all on appointments, wartime or otherwise, in the Officers' Reserve Corps.

Prior to 1933 Section 127(a), Par. 7, read in pertinent part:

> In time of war any officer of the Regular Army may be appointed to higher temporary rank without vacating his permanent commission, such appointments in grades below that of brigadier general being made by the President alone, *but all other appointments of officers in time of war shall be in the Officers' Reserve Corps.* (National Defense Act, as added by sec. 51, Act June 4, 1920, 41 Stat. 785.) [Emphasis added.]

By amendment of June 15, 1933 (48 Stat. 161), Congress struck from Section 127(a) the provision relating to appointments in the Officers' Reserve Corps in time of war (portion italicized above). And from the relevant legislative history (H. Rep. 141, 73rd Congress, 1st Sess. May 16, 1933, p. 8), it clearly appears that the intention of Congress in so amending Section 127(a) was to confine the application thereof to temporary wartime appointments, *without component*, in the Army of the United States. Hence appointments in components of the Army of the United States, such as the Officers' Reserve Corps, are excluded from the operation of the statute.

In keeping with the said amendment and the Congressional intention behind it, Section 127(a) was, throughout the period of hostilities during World War II, interpreted by administrative agencies of the Government, as well as

by Congress itself, as being without application to wartime appointments in the Officers' Reserve Corps. (See, for example, ruling of Judge Advocate General issued April 10, 1943, SPJGA 1943/4798, R. 47.)

III. RESERVE CORPS APPOINTMENTS DURING WORLD WAR II, WHILE NOT AFFECTED BY SECTION 127(a), WERE MODIFIED BY EMERGENCY WARTIME LEGISLATION.

As shown above in Sections I and II of this Argument, Section 37 of the National Defense Act is the basic statute governing appointments in the Officers' Reserve Corps, and Section 127(a) of the said Act does not now modify such appointments nor did it modify them during World War II hostilities. Therefore the criteria of Section 127(a), including that with respect to the termination of the war, are irrelevant to the case at bar.

However, emergency legislation forerunning and attending the hostilities of World War II did, for a time, affect Reserve Corps appointments. The first of such enactments was a Joint Resolution of September 22, 1941 (H. J. Res. 199, 55 Stat. 728) (Appendix, p. 17), which provided that during the then present emergency temporary appointments of officers might be made without component in the Army of the United States; and that any appointment so made should continue "during the present emergency and six months thereafter * * * and provided, further, that nothing contained in this act shall be construed to prohibit the appointment of officers in the various components of the Army in accordance with existing laws." Throughout the period of World War II hostilities, this resolution was cited by the Congress, the Army, the Judge Advocate General of the Army, the Attorney General, the Comptroller General, and other administrative agencies of the Government, as the sole authority for wartime appointments in the

Army of the United States without component; and this resolution was also regarded as the statutory sanction for wartime appointments in the Officers' Reserve Corps under Section 37 of the National Defense Act.[4] In this view, Section 127(a) of the National Defense Act was wholly inapplicable to wartime Reserve Corps appointments.

The second relevant enactment was the act of December 13, 1941 (55 Stat. 799, 50 U.S.C., Appx. 731-732) (Appendix, p. 18), which provided *inter alia* for the extension of the periods of appointment and commission of "all members of the Army of the United States now or hereafter in or subject to active military service of the United States" for the period of "the existence of any war in which the United States is engaged and during the six months immediately following the termination of any such war." Since the Officers' Reserve Corps is one component of the Army of the United States, it will be seen that this act operated on the face of it to extend the terms of Reserve

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[4] Army Regulations issued and in effect throughout World War II cite the Joint Resolution of September 22, 1941 as sole authority for appointment of temporary officers in the Army of the United States. (See Army Regulations 605-10: R. 36.) Numerous opinions of the Judge Advocate General of the Army are to the same effect. SPJGA 013.1 (June 6, 1942); SPJGA 210.451 (July 8, 1942); SPJGA 1943/12601 (August 23, 1943); SPJGA 1944/4394 (May 9, 1944); SPJGA 1946/2939 (April 9, 1946) and JAGA 1946/7910 (Sept. 22, 1946) (R. 56.) Subsequent wartime legislation amended in separate instances the said Joint Resolution of September 22, 1941, to protect the pay of warrant officers appointed during World War II, to establish the WAC, to provide for the appointment of nurses and other female personnel, etc.—all indicating that Congress considered the Joint Resolution as the sole authority for wartime appointments, with or without component, in the Army of the United States. (See act of July 1, 1943, 53 Stat. 371; act of July 7, 1943, 53 Stat. 380; act of June 22, 1944, 58 Stat. 324.) An opinion of the Attorney General issued on September 1, 1945 is to the same effect. (50 Op. Atty. Gen. 421.) So also are opinions of the Comptroller General issued after the enactment of the Joint Resolution on September 22, 1941. (See 25 Comp. Gen. 663, March 22, 1946; 25 Comp. Gen. 203, August 20, 1945; 25 Comp. Gen. 18, July 7, 1945; 25 Comp. Gen. 512, January 9, 1946; 25 Comp. Gen. 870, June 14, 1946.)

Corps appointments as provided therein—and it was construed so to operate by the Judge Advocate General.[5]

From the foregoing, it can be seen that the present position of respondents in this matter—that Section 127(a) is and was throughout World War II hostilities the controlling provision as to Reserve Corps appointments—constitutes a complete reversal and repudiation of all construction of the aforesaid emergency legislation during the life of that legislation which terminated on July 25, 1947.

IV. BY JOINT RESOLUTION OF JULY 25, 1947 CONGRESS TERMINATED THE WAR WITH RESPECT TO THE EXTENSION OF THE TERMS OF RESERVE CORPS APPOINTMENTS BY THE AFORESAID EMERGENCY LEGISLATION, AND THEREFORE THE TERMS OF SUCH APPOINTMENTS ARE ONCE AGAIN GOVERNED BY SECTION 37 OF THE NATIONAL DEFENSE ACT.

As above stated, the act of December 13, 1941, which expressly extended the terms of Reserve Corps appointments until six months after the termination of war, was recognized as the sole statutory authority for such extensions by all military and other Governmental authorities; and, similarly, the Joint Resolution of September 22, 1941 was recognized as the sole statutory authority for wartime appointments in the Reserve Corps.

On July 25, 1947 the Congress adopted a Joint Resolution (S. J. 123, 61 Stat. 449) (Appendix, *infra*, p. 18) repealing the aforesaid Joint Resolution of September 22, 1941 and declaring that as of its effective date the war was to be deemed terminated with respect to the said act of December 13, 1941. The wartime status of the appointments of petitioner and all other officers in the Army of the United States having been thus expressly terminated, it

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[5] For example of this settled construction, during the period of hostilities of World War II, see ruling of Judge Advocate General, issued April 10, 1943, SPJGA, 1943/4798, R. 47.

necessarily follows that Section 37 of the National Defense Act has since that time once again governed Reserve Corps appointments in all their aspects, including that of length of term.

Petitioner's stated term of appointment under Section 37 having expired, he may not lawfully be detained on active duty by respondents.

V. EVEN ASSUMING *ARGUENDO* THAT SECTION 127(a) MAY BE CONSTRUED TO APPLY IN TERMS TO RESERVE CORPS APPOINTMENTS, IN TIME OF WAR, IT CANNOT NOW BE APPLICABLE TO SUCH APPOINTMENTS BECAUSE THE WAR WAS NECESSARILY TERMINATED WITH RESPECT TO THE SAID STATUTE BY THE JOINT RESOLUTION OF JULY 25, 1947.

As fully set forth in Section II of this Argument, *infra*, Section 127(a), both in terms and by legislative history, is inapplicable to Reserve Corps appointments, either in wartime or in peacetime. Its inapplicability even to wartime Reserve Corps appointments was consistently accepted by all military and other Governmental authorities throughout World War II hostilities, and indeed thereafter.[6]

However, even if it be assumed *arguendo* that, despite its legislative history and universal construction, Section 127(a) applies to wartime appointments in the Reserve Corps, petitioner submits that such application was terminated by the Joint Resolution of July 25, 1947, which terminated the war with respect to the act of December 13, 1941. This follows from settled principles of statutory construction.

Section 127(a), Par. 7, purports to extend wartime appointments in the Army of the United States for the duration of the war and six months thereafter. So did the act of December 13, 1941. Save that the latter statute clearly applies to Reserve Corps appointments, and that the former

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[6] See Footnotes 4 and 5 on pages 11 and 12.

statute, certainly in express terms, does not so apply, the provision of the two statutes for extension of appointments is virtually identical.

Section 127(a), more fully set forth in Section II, *infra*, provides in pertinent part that "an appointment • • • made in time of war, shall continue until six months after its termination, and an officer appointed in time of war shall be entitled to be relieved from active Federal service within six months after its termination if he makes application therefor." The act of December 13, 1941 provides for the extension of the periods of appointment and commission of "all members of the Army of the United States" on active duty for the period of "the existence of any war in which the United States is engaged and during the six months immediately following the termination of any such war."

Thus it can be seen that the two statutes each and severally provide for exactly the same thing: the extension of appointments until six months after the termination of war. This being true, it is submitted that the aforesaid Joint Resolution of July 25, 1947, which declared the war to be terminated with respect to the act of December 13, 1941, necessarily terminated the war with respect to the identical extension of appointments by Section 127(a). Any other reading of this resolution would make it a nullity—an empty gesture.

The war having terminated, then, on July 25, 1947, with respect both to the act of December 13, 1941 and Section 127(a), there is no longer in force any legislation whereby appointments in the Army of the United States—with or without component—are or may be extended. Hence Section 37 of the National Defense Act applies, wherefore petitioner was entitled to release from active duty upon the expiration of his stated term of appointment.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the District Court was clearly erroneous, and that review thereof by this Court prior to judgment in the Court of Appeals is abundantly warranted under the circumstances of the case and in view of the public interest involved.

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APPENDIX

Section 37 of the National Defense Act (10 U.S.C. §§ 351 *et seq.*):

> OFFICERS' RESERVE CORPS. For the purpose of providing a reserve of officers available for military service when needed there shall be organized an Officers' Reserve Corps consisting of general officers and officers assigned to sections corresponding to the various branches of the Regular Army and such additional sections as the President may direct. The grades in each section and the number in each grade shall be as the President may prescribe. All persons appointed in the Officers' Reserve Corps are reserve officers and shall be commissioned in the Army of the United States. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate. Appointment in every case in the Officers' Reserve Corps shall be for a period of five years, but an appointment in force at the outbreak of war shall continue in force until six months after its termination: *Provided,* That an officer of the Officers' Reserve Corps shall be entitled to be relieved from active Federal service within six months after its termination if he makes application therefor. Any officer of the Officers' Reserve Corps may be discharged at any time in the discretion of the President. * * *

Section 127 (a), Par. 7, of the National Defense Act (10 U.S.C. § 513):

> HIGHER TEMPORARY GRADES; APPOINTMENTS OF OFFICERS IN TIME OF WAR. In time of war or national emergency determined by the President any officer of the Regular Army may be appointed to higher temporary grade without vacating his permanent appointment. In time of war any officer of the Regular Army appointed to higher temporary grade, and all other persons appointed, as officers, shall be appointed and commissioned in the Army of the United States. Such

appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: *Provided,* That an appointment, other than that of a member of the Regular Army made in time of war, shall continue until six months after its termination, and an officer appointed in time of war shall be entitled to be relieved from active Federal service within six months after its termination if he makes application therefor.

Joint Resolution of September 22, 1941 (H.J. Res. 199, 55 Stat. 728):

Temporary appointment of officers in the Army of the United States.—That during the present emergency, temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service of the United States to serve therein for such periods of time as the President may prescribe. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: *Provided,* That any appointment made under the provisions of this Act may be vacated at any time by the President and, if not sooner vacated, shall continue during the present emergency and six months thereafter: *Provided further,* That any person appointed as an officer in the Army of the United States under the provisions of this Act shall receive the same pay and allowances and be entitled to the same rights, privileges, and benefits as members of the Officers' Reserve Corps of the same grade and length of active service: *And provided further,* That nothing contained in this Act shall be construed to prohibit the appointment of officers in the

various components of the Army of the United States in accordance with existing laws.

Act of December 13, 1941 (55 Stat. 799, 50 U.S.C., Appx. §§ 731-2):

50 U.S.C., Appx., § 731. *Suspension of territorial ban on use of Army.* The provisions of Public Resolution Numbered 96, Seventy-sixth Congress, approved August 27, 1940, as amended, and of Public, Numbered 783, Seventy-sixth Congress (the Selective Training and Service Act of 1940), as amended [sections 401-405 and 301-318 of 50 U.S.C. Appendix], insofar as they restrict the territorial use of units and members of the Army of the United States, are suspended during the existence of any war in which the United States is engaged, and during the six months immediately following the termination of any such war. Dec. 13, 1941, c. 571, § 1, 55 Stat. 799.

50 U.S.C., Appx. §732. *Extension of periods of service, training, etc., of all members of the Army.* The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States, now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section [section 731 of 50 U.S.C. Appendix]: *Provided*, That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case. Dec. 13, 1941, c. 571, §2, 55 Stat. 800.

Joint Resolution of July 25, 1947 (S.J. Res. 123, 61 Stat. 449):

* * * * * * *

Sec. 2 Notwithstanding the termination date or termination period heretofore provided therefor by law, the following statutory provisions are repealed effective upon the date hereinafter specified, or upon the

expiration of the period hereinafter specified, and shall remain in full force and effect until such date or until the expiration of such period. Such statutory provisions are hereby amended accordingly:

a. Repeal effective July 1, 1948:

* * * * * * *

Act of September 22, 1941 (55 Stat. 728, ch. 414), as amended: *Provided, however,* That so long as the Secretary of War deems it necessary in the interest of national defense, each man who completed a course of medical instruction at Government expense in a university, college or other similar institution of learning, pursuant to the provisions of the Act of February 6, 1942 (56 Stat. 50, ch. 40), as amended, shall not be relieved from active duty until the completion of two years of active service as a commissioned officer, exclusive of any periods during which he served as an interne;

* * * * * * *

Sec. 3. In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941;

* * * * * * *

Section 2 of the Act of December 13, 1941 (55 Stat. 799, ch. 571);

* * * * * * *

Approved July 25, 1947.

WASHINGTON, D. C.

Office - Supreme Court, U. S.
FILED
JAN 18 1952
CHARLES ELMORE CROPLEY
CLERK

January 17, 1952

Hon. Charles E. Cropley,
Clerk, Supreme Court of the United States,
Washington, D. C.

Dear Mr. Cropley: In re: Miley v. Lovett - No. 469
October Term, 1951

Reference is made to my letter of January 4, 1952, on the subject of the pending petition for certiorari to the United States Court of Appeals for the Fourth Circuit in the above case.

The Court of Appeals heard argument of the case on its merits on January 9, 1952, and it is now pending in that Court for decision. The Court has indicated that it will decide the matter promptly.

In view of these facts, request is hereby made that the Supreme Court of the United States defer action on the pending petition for certiorari until after decision has been rendered by the United States Court of Appeals for the Fourth Circuit. At that time I shall undertake to call the attention of the Supreme Court to the decision of the Court of Appeals and request such action in the premises as may then be appropriate.

Respectfully yours,

Edmund D. Campbell

Attorney for William H. Miley,
Petitioner

EDC:mlc

cc; Hon. Philip B. Perlman,
Solicitor General of the United States,
Washington 25, D. C.

Mr. Claude M. Dean,
Clerk, United States Court of
Appeals for the Fourth Circuit,
Post Office Building,
Charlotte, North Carolina.

Post Office Building,
Charlotte, North Carolina.

WASHINGTON, D. C.

COPY

January 4, 1952

Mrs. Charles A. Bryan,
Clerk, Supreme Court of the United States,
Washington, D. C.

Dear Mr. Bryan: Re: Hiss v. Lowry - No. 469

On January 3, 1952, in the above case, I filed in the Supreme Court a petition for certiorari to the United States Court of Appeals for the Fourth Circuit [illegible]. The petition was filed [illegible] Rule 38(1) and Rule 39 of your Court.

Following the filing of the petition for certiorari, I made application to the Circuit Court of Appeals for the Fourth Circuit for a continuation of further proceedings on the appeal in that court pending action by the Supreme Court on the petition for certiorari. When my application for continuance came on for hearing before the Court of Appeals on yesterday, that Court announced that it would hear our pending appeal on the merits, on January 9, 1952, and indicated it would render a prompt decision thereafter.

In fairness to both courts I feel that I should advise the Clerk of the Court of Appeals a matter of record in your Court.

Respectfully yours,

Fidelity Union Trust Co.

Edward D. Campbell

Attorney for Petitioner in Hiss v. Lowry

cc: Mr. Alger Hiss

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982736—52

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 469

WILLIAM H. MILEY, PETITIONER

v.

ROBERT A. LOVETT, SECRETARY OF DEFENSE OF THE UNITED STATES; FRANK C. PACE, JR., SECRETARY OF THE ARMY; AND JOSEPH LAWTON COLLINS, CHIEF OF STAFF, UNITED STATES ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the District Court (R. 64–70) is unreported.

JURISDICTION

The Court of Appeals has not yet decided the appeal. The petition for the writ of certiorari was filed on December 7, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 28 U. S. C. 2101 (d).

QUESTIONS PRESENTED

1. Whether a matter of such exceptional public interest is involved as to warrant the granting of the petition for certiorari prior to final judgment by the Court of Appeals in a case in which it has already heard argument.

2. Whether the commission of an officer appointed during wartime in 1946 in the Officers' Reserve Corps, Army of the United States, was of five years' duration, or of continuing duration until six months after termination of the war.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 7–11.

STATEMENT

Petitioner filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia directed to the Secretary of Defense, the Secretary of the Army, and the Chief of Staff, alleging that he was being unlawfully detained as a captain recalled to active duty in the Army of the United States (R. 1–3). The pertinent facts may be summarized as follows:

After having been inducted in 1943, petitioner was honorably discharged as an enlisted man and commissioned a second lieutenant in the Army of the United States (R. 2, 8, 11–12). He had reached the rank of captain by July 31, 1946, when he was relieved from active duty (R. 2, 13). On the same day, upon his application, he was

appointed a captain in the Judge Advocate General Department, Officer Reserve Corps in the Army of the United States (R. 2, 8, 14A–16A).

On November 27, 1950, in conformity with Section 2, Selective Service Extension Act of 1950 (Public Law 599, 81st Congress), extending the Selective Service Act of 1948, 62 Stat. 604, Sec. 21 (50 U. S. C. App., Supp. IV, 451 *et seq.*), the President ordered the petitioner into active military service for a period of 21 months. Petitioner reported for active duty on January 2, 1951, as a captain, Judge Advocate General Corps in the Officers' Reserve Component of the Army of the United States. (R. 3, 10, 17–18.) An order for petitioner's assignment to overseas duty in Germany was issued on August 31, 1951 (R. 10, 18). On September 10, 1951, petitioner wrote the Adjutant General of the Army requesting immediate honorable separation from the Service on the ground that his reserve commission had expired on July 31, 1951, five years after its acceptance on July 31, 1946 (R. 11, 38–39).

The petition for habeas corpus was filed on September 12, 1951 (R. 1–3), and on the same day petitioner was assigned to duty in the Branch Office of the Judge Advocate General at Fort Holabird, Baltimore, Maryland (R. 11). Subsequent to the filing of the return (R. 7–11), a hearing was held on October 8, 1951, at which

evidence was introduced by stipulation and exhibits (R. 64). The District Court on October 24, 1951, entered an order discharging the writ of habeas corpus and dismissing the petition (R. 70–71).

On October 26, 1951, petitioner filed a notice of appeal to the Court of Appeals for the Fourth Circuit (R. 71). While this appeal was pending and before judgment thereon petitioner filed his petition for a writ of certiorari. On January 9, 1952, the Court of Appeals heard argument on the merits.

ARGUMENT

1. The petition for certiorari should be denied as premature since filed prior to judgment by the Court of Appeals. Cf. *United States* v. *Montgomery Ward Co.*, 324 U. S. 858; *Saxe* v. *Anderson*, 302 U. S. 688. Although this Court possesses power to grant a petition for certiorari prior to judgment by a Court of Appeals in exceptional cases involving great public interest,[1] this is a power not ordinarily exercised. *The Three Friends*, 166 U. S. 1, 49; *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 385.

[1] 28 U. S. C. 1254 (1); 28 U. S. C. 2101 (d); United States Supreme Court Rule 39; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 243, 295 (power of Congress to invalidate "gold clauses" in private money contracts); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 333–334 (constitutionality of Railroad Retirement Act of 1934); *United States* v. *United Mine Workers of America*, 330 U. S. 258, 261 (1947 coal strike).

Here there is no matter of great public interest necessitating an early ruling by this Court. While there may be other officers on active duty in the armed services with a status analogous to that of the petitioner (see Pet. 5), he has not brought a representative class suit on their behalf, and so far as we are advised, his is the only pending action raising the question he poses. Moreover, not being scheduled for release from active duty until June 2, 1952 [2] (Pet. 5), petitioner has failed to show that he would be unable to get a decision by the Court of Appeals and a ruling by this Court on a petition for certiorari by that date. Indeed, the Court of Appeals, which set the case for argument on January 9 upon a week's notice, obviously is giving the matter expeditious consideration. Accordingly, it cannot be said that the petitioner will not have time to seek review by this Court after decision by the Court of Appeals, if that decision should be adverse to him. Moreover, petitioner is asking this Court to grant certiorari without giving to the Court of Appeals an opportunity to decide a case which it has already heard.

2. For present purposes, we rely upon the opinion of the District Court (R. 64–70) as constituting a correct determination of the substantive question presented by the petition.

---

[2] We are informed by the office of the Judge Advocate General that petitioner is presently on active duty in Paris, France, on General Eisenhower's staff.

CONCLUSION

Petitioner has failed to show any exceptional circumstances justifying a grant of the writ of certiorari which would prevent the Court of Appeals from deciding a case which it has already heard. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JANUARY 1952.

APPENDIX

Section 37 of the National Defense Act of r the pur-
Stat. 154 (10 U. S. C. § 351 *et seq.*): of officers
en needed
ficers' Re-

OFFICERS' RESERVE CORPS. For the al officers
pose of providing a reserve of of ns corre-
available for military service when ne es of the
there shall be organized an Officers' tional sec-
serve Corps consisting of general of rect. The
and officers assigned to sections c number in
sponding to the various branches of sident may
Regular Army and such additional ted in the
tions as the President may direct. eserve offi-
grades in each section and the numb led in the
each grade shall be as the President Such ap-
prescribe. All persons appointed in t of briga-
Officers' Reserve Corps are reserve the Presi-
cers and shall be commissioned in rs by and
Army of the United States. Such the Senate.
pointments in grades below that of b he Officers'
dier general shall be made by the P period of
dent alone, and general officers by nt in force
with the advice and consent of the Se continue in
Appointment in every case in the Offi its termi-
Reserve Corps shall be for a perio ficer of the
five years, but an appointment in be entitled
at the outbreak of war shall contin deral service
force until six months after its te rmination if
nation: *Provided,* That an officer of Any offi-
Officers' Reserve Corps shall be ent Corps may
to be relieved from active Federal se he discretion
within six months after its terminati
he makes application therefor. Any
cer of the Officers' Reserve Corps
be discharged at any time in the discr
of the President. * * *

Section 127a, Par. 7, of the National Defense Act, 48 Stat. 161, 54 Stat. 875 (10 U. S. C. § 513):

> In time of war or national emergency determined by the President any officer of the Regular Army may be appointed to higher temporary grade without vacating his permanent appointment. In time of war any officer of the Regular Army appointed to higher temporary grade, and all other persons appointed, as officers, shall be appointed and commissioned in the Army of the United States. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: *Provided,* That an appointment, other than that of a member of the Regular Army made in time of war, shall continue until six months after its termination, and an officer appointed in time of war shall be entitled to be relieved from active Federal service within six months after its termination if he makes application therefor.

Joint Resolution of September 22, 1941 (H. J. Res. 199, 55 Stat. 728):

> That during the present emergency, temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service

of the United States to serve therein for such periods of time as the President may prescribe. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: *Provided,* That any appointment made under the provisions of this Act may be vacated at any time by the President and, if not sooner vacated, shall continue during the present emergency and six months thereafter: *Provided further,* That any person appointed as an officer in the Army of the United States under the provisions of this Act shall receive the same pay and allowances and be entitled to the same rights, privileges, and benefits as members of the Officers' Reserve Corps of the same grade and length of active service: *And provided further,* That nothing contained in this Act shall be construed to prohibit the appointment of officers in the various components of the Army of the United States in accordance with existing laws.

Joint Resolution of December 13, 1941 (S. J. Res. 117; 55 Stat. 799–800; 50 U. S. C. App. §§ 731–732):

That the provisions of Public Resolution Numbered 96, Seventy-sixth Congress, approved August 27, 1940, as amended, and of Public, Numbered 783, Seventy-sixth Congress (the Selective Training and Service Act of 1940), as amended, insofar as they restrict the territorial use of units and members of the Army of the United States, are suspended during the existence of any war in which the United States is

engaged, and during the six months immediately following the termination of any such war.

Sec. 2. The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section: *Provided,* That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case.

* * * * *

Joint Resolution of July 25, 1947 (S. J. Res. 123, 61 Stat. 449):

* * * * *

Sec. 2. Notwithstanding the termination date or termination period heretofore provided therefor by law, the following statutory provisions are repealed effective upon the date hereinafter specified, or upon the expiration of the period hereinafter specified, and shall remain in full force and effect until such date or until the expiration of such period. Such statutory provisions are hereby amended accordingly.

a. Repeal effective July 1, 1948:

* * * * *

Act of September 22, 1941 (55 Stat. 728, ch. 414), as amended:

* * * * *

Sec. 3. In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by

the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941;

* * * * *

Section 2 of the Act of December 13, 1941 (55 Stat. 799, ch. 571):

* * * * *

Paragraph 3 of section 127a as added to the Act of June 3, 1916 (39 Stat. 166), by section 51 of the Act of June 4, 1920 (41 Stat. 759, ch. 227);

* * * * *

Approved July 25, 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947